No. 220. 136.

Off. of DuBignon for Resp't.

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Supreme Court of the United States.

October Term, 1900.

No. 220.

Filed Oct. 15, 1900

William B. Dinsmore and C. Gray Dinsmore, and William B. Dinsmore, C. Gray Dinsmore, and Dumont Clarke, as Executors and Trustees under the Will of William B. Dinsmore, Deceased, Petitioners,

vs.

The Southern Express Company, L. N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, composing the Railroad Commission of the State of Georgia, et al.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Statement of Southern Express Company in response to notice of the application of petitioners for writ of certiorari.

FLEMING G. duBIGNON,
Attorney for Southern Express Company,
Savannah, Georgia.

SAVANNAH GA
THE MORNING NEWS PRINT
1900.

Supreme Court of the United States.

October Term, 1900.

No. 390.

William B. Dinsmore and others,

vs.

The Southern Express Company and others.

Petition for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review and reverse decision of the Circuit Court of Appeals as reported in 102 Federal Reporter, 794, reversing decision in the Court below, reported 92 Federal Reporter, 714.

Statement of the Southern Express Company in response to notice of the application of petitioners for writ of certiorari.

In response to the notice of the application of the petitioners herein for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, served upon the Southern Express Company on August the 7th, 1900, it respectfully submits:

1. That the Southern Express Company, a corporation existing under the laws of Georgia, and a

common carrier of express matter, did, after the passage of the Act of Congress, approved June 13th, 1898, require that its patrons supply, at their expense, the revenue stamps necessary to be attached to and cancelled upon "bills of lading, manifests, or other memorandum, and to each duplicate thereof," under the provisions of sections 6 and 25 of the said Act of Congress.

2. That certain citizens of Georgia refused to supply, at their expense, the stamps necessary to be attached to "bills of lading, manifests, or other memorandum," and thereupon entered their complaint to the Railroad Commissioners of Georgia, who, after consideration, issued an order reciting that it had been represented to the Commission that the Southern Express Company had "exacted and continues to exact from shippers, as a condition precedent to forwarding any goods tendered to it for transportation between points within the State, the payment of a special tax upon such shipments imposed by said Act, thus indirectly increasing the cost of transportation beyond the rate fixed therefor by this Commission," and requiring the Southern Express Company, on a day named, "to show cause, if any it can, why it should not be held to have violated the rules and regulations of this Commission by the exactions or overcharges, as aforesaid, and why suit should not be instituted against it in every case of such overcharges for the recovery of the penalty provided by law for such illegal act." (Record, page 5).

3. That the Southern Express Company appeared, as required by said order, and denied that the Railroad Commission of Georgia had any jurisdiction in the premises. (Record, page 5.)

4. That thereafter, on August the 2nd, 1898, the said Railroad Commission of Georgia, through its Chairman, "ordered that unless within five days from this date this Commission is advised by the Southern Express Company that it has discontinued the practice of exacting from shippers the duty of furnishing the requisite revenue stamps to be attached to bills of lading or receipts as a condition precedent to receiving and forwarding goods tendered for shipment, that this Commission will take such legal steps as may be necessary to enforce compliance with its rules and regulations." (Record, page 55.)

5. That under the constitution and statute laws of Georgia (See record, pages 5 and 6), the penalty fixed for violating any order or rule or regulation of the Railroad Commission of Georgia is not less than one thousand dollars nor more than five thousand dollars for each offense.

6. That the Southern Express Company "declined to test in the Courts the question whether the war stamp tax on its bills of lading and manifests is payable by the shipper or by itself. This was done because of the enormous penalties—from one thousand to five thousand dollars fine in each case—with which it was solemnly threatened by the Railroad Commission unless in five days it abandoned its contention that the shipper must pay the tax, accept all shipments and itself furnish, affix and cancel the stamps." (Record, page 29). The Southern Express Company, through its directors, resolved that "it is deemed expedient to comply with the orders of the Railroad Commission of Georgia in the premises, in order to avoid penalties under the laws of Georgia and so clouding the Company's title to its

corporate franchises and rights as to embarrass its action." (Record, page 30).

7. That the Southern Express Company considered, and does yet consider, that the Railroad Commission of Georgia was without jurisdiction in the matter and that its aforesaid order therein was illegal; but for the reasons hereinbefore stated, it deemed it expedient to comply with said order.

8. That the Southern Express Company believes that the judgment rendered by the Circuit Court of Appeals for the Fifth Circuit, in this case, is erroneous in the particulars stated, and for the reasons assigned by petitioners herein on their application for writ of certiorari.

Respectfully submitted,

FLEMING G. DuBIGNON,
Attorney for Southern Express Company,
Savannah, Ga.

No. 390.

FILED
OCT 15 1900
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 390.

Filed Oct. 15, 1900.

WILLIAM B. DINSMORE AND C. GRAY DINSMORE, AND WILLIAM B. DINSMORE, C. GRAY DINSMORE AND DUMONT CLARKE, AS EXECUTORS AND TRUSTEES UNDER THE WILL OF WILLIAM B. DINSMORE, DECEASED, Petitioners,

vs.

THE SOUTHERN EXPRESS COMPANY; L. N. TRAMMELL, THOMAS C. CRENSHAW, JR., AND SPENCER R. ATKINSON, COMPOSING THE RAILROAD COMMISSION OF THE STATE OF GEORGIA, ET AL.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth District.

BRIEF OF JOSEPH M. TERRELL, OF COUNSEL FOR THE RAILROAD COMMISSION OF GEORGIA.

ATLANTA, GEORGIA
The Franklin Printing and Publishing Company
1900

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1900,

No. 390.

WILLIAM B. DINSMORE AND C. GRAY DINSMORE, AND WILLIAM B. DINSMORE, C. GRAY DINSMORE AND DUMONT CLARKE, AS EXECUTORS AND TRUSTEES UNDER THE WILL OF WILLIAM B. DINSMORE, DECEASED, Petitioners,

vs.

THE SOUTHERN EXPRESS COMPANY; L. N. TRAMMELL, THOMAS C. CRENSHAW, JR., AND SPENCER R. ATKINSON, COMPOSING THE RAILROAD COMMISSION OF THE STATE OF GEORGIA, ET AL.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth District.

BRIEF OF JOSEPH M. TERRELL, OF COUNSEL FOR THE RAILROAD COMMISSION OF GEORGIA.

STATEMENT OF THE CASE.

Complaint being lodged with the Railroad Commission of Georgia against the Southern Express Company to the effect that the company, a Georgia corporation, engaged as a common carrier in the transportation of goods between points within the State of Georgia, demanded as a condition precedent to forwarding goods tendered to it for shipment that the consignor deliver to it the necessary revenue stamp to be af-

fixed to the bill of lading required to be issued by the War Revenue Act, or pay the cost of such revenue stamp, and that it refused to transport and deliver goods tendered it for shipment except upon compliance with such demand, and that such conduct was a violation of those provisions of the law in this State limiting the rates of freight chargeable by express companies to the rates prescribed by the Commission, an order was thereupon issued by the Commission calling upon the Southern Express Company to show cause why suits should not be instituted against it for the recovery of the penalties prescribed by law for the exaction from shippers of a stamp in addition to and in excess of the rates prescribed by the Commission. In response to this rule the company by its counsel appeared and answered in effect that the Commission had no jurisdiction to inquire of and determine the several matters and things set forth in the rule, and admitted that it had declined to receive goods for shipment unless a tax imposed by the War Revenue Act upon each and every bill of lading was tendered with the goods intended to be consigned, and denied that the Commission had any authority to inquire or act concerning any such refusal by it to receive goods for transportation. Upon the consideration of this rule and answer the Railroad Commission passed on the 2d day of August, 1898, the following order:

"RAILROAD COMMISSION OF GEORGIA,
ATLANTA, GA., August 2, 1898.

"*In re*, complaint against the Southern Express Company for overcharges in demanding that shippers furnish revenue stamps to affix to bills of lading or receipts.

"On motion of Commissioner Crenshaw it is ordered: That the report and opinion this day filed by Commissioner Atkinson, to whom the above entitled matter was referred, be, and the same is, hereby adopted as the opinion and judgment of this Commission.

"And it is further ordered: That unless within five days from this date this Commission is advised by the Southern Express Company that it has discontinued the practice of exacting from shippers the duty of furnishing the requisite revenue stamps to be attached to bills of lading, or receipts as a condition precedent to receiving and forwarding goods tendered for shipment, that this Commssion will take such legal steps as may be necessary to enforce compliance with its rules and regulations.

By order of the board.

L. N. TRAMMELL, Chairman.

J. D. MASSEY, Secretary."

The opinion of Commissioner Atkinson referred to in said order is hereto attached and made a part of this brief.

The Southern Express Company duly notified the Commission of its intention to comply with this order. Whereupon William B. Dinsmore *et al.*, citizens of New York, and stockholders of the Southern Express Company, filed their bill against the Southern Express Company and L. N. Trammell, T. C. Crenshaw, Jr., and Spencer R. Atkinson, individually, and as Railroad Commissioners, and J. M. Terrell, individually, and as Attorney-General, praying that the Southern Express Company be restrained from voluntarily complying with the provisions of said order of August 2, 1898, and from paying the war revenue tax, and that said order of August 2d be adjudged and decreed to be without jurisdiction on the part of the Commission and unconstitutional, null and void, and that the Railroad Commission and the Attorney-General be restrained from instituting any suit of any sort against the Southern Express Company for the purpose of enforcing the provisions of said order of August 2, 1898. (Printed Record, page 9.)

To this bill these State officials filed a general and special demurrer—P. R., pages 20, 21 and 22. The additional special

demurrer of the Attorney-General—P. R., pages 22 and 23—being practically sustained in that the Court refused to enjoin that officer.

This cause was heard upon the bill and demurrer thereto on the 10th day of February, 1899, and his Honor, Judge Emory Speer, rendered a decree therein on the 7th day of March, 1899, denying the prayer that the Southern Express Company be enjoined from voluntarily paying the war stamp tax in question, and enjoining the Railroad Commission of Georgia and each member thereof "from any and all order, direction, action or legal steps instituting, or tending to institute, and from any and all proceedings for the recovery of the penalties named in the statute of Georgia in that behalf to enforce compliance with its said order against the Southern Express Company, its officers or agents, as threatened in the order of said Commission, dated August 2, 1898, for the reason that said order is null and void, and said Commission has no jurisdiction to adjudge and designate the party who shall pay the tax."—P. R., page 35. To this decree the Railroad Commission of Georgia entered an appeal, and W. B. Dinsmore *et al.* entered a cross-appeal.

The opinion of the Circuit Court by Judge Emory Speer, which was filed with said decree, will be found on page 29 of printed record, and also 92 Fed. Rep. 715. The Circuit Court of Appeals reversed Judge Speer and ordered the bill dismissed. P. R., pages 57–61, also 102 Fed. Rep. 794—Judge Shelby dissenting—P. R., page 61, also 102 Fed. Rep 803.

Assignments of Error on the Appeal relied upon were as follows:

1. That the Court erred in not sustaining the demurrer of these defendants to the bill of said W. B. Dinsmore *et al.* Said demurrer should have been sustained upon each and every ground therein mentioned.

2. That the Court erred in granting the injunction against these defendants as set out in said decree.

3. That the Court erred in holding the order rendered by these defendants, as Railroad Commissioners, on the 2d day of August, 1898, to be null and void.

4. That the Court erred in holding that under the facts and circumstances set forth in said bill these defendants as Railroad Commissioners of Georgia did not have competent authority under the law for the institution and prosecution of the said threatened suits.

5. That the Court erred in holding that the said action of the said Express Company in compelling the consignor to pay a charge which had been imposed by the War Revenue Act of 1898 upon it did not amount to an increase of the rate prescribed by the said Railroad Commission for express companies doing business in Georgia.

6. That the Court having under said bill taken jurisdiction in equity for the purpose of preventing the institution and prosecution of a multiplicity of suits respecting the same subject matter erred in declining to consider, adjudicate and determine the principal matters in controversy, that is to say, whether the said Express Company or the consignor was liable for said tax, and whether the said Express Company being so liable the said Railroad Commissioners had competent authority to institute and prosecute said threatened suits, and further erred in granting the said injunction without determining said matters. P. R., pages 36 and 37.

Assignments of Error on the Cross-Appeal were as follows:

1. That the Court erred in denying any injunction against the Southern Express Company as prayed for.

2. That the Court erred in refusing to enjoin the Southern Express Company from voluntarily complying with the order of the Railroad Commission of August 2, 1898, set out in the Complainants' bill.

3. That the Court erred in refusing to enjoin the Southern

Express Company from paying the War Revenue tax imposed under the Act of Congress approved June 13, 1898, entitled: An Act to provide ways and means to meet war expenditures, and for other purposes—namely, a stamp of the value of one cent to each bill of lading, manifest, or memoranda, and to each duplicate thereof, which the Railroad Commission, on August 2, 1898, ordered the Express Company to pay and they continued to pay because of such order. P. R., page 41.

Sections of the Georgia Code cited on this brief, and deemed necessary to the decision of the case. As to the enactment of the Code see 104 Ga. 831.

Section 2187. "If any railroad corporation organized or doing business in this State under any act of incorporation or general law in this State now in force, or which may hereafter be enacted, or any railroad corporation organized or which may hereafter be organized under the laws of any other State, and doing business in this State, shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad car upon its track, or any of its branches thereof, or upon any railroad within this State which it has the right, license or permission to use, operate or control, the same shall be deemed guilty of extortion, and, upon conviction thereof, shall be dealt with as hereinafter provided."

Section 2189. "The commissioners shall make reasonable and just rates of freight and passenger tariffs, to be observed by all railroad companies doing business in this State, on the railroads thereof; shall make reasonable and just rules and regulations, to be observed by all railroad companies doing business in this State, as to charges at any and all points for the necessary handling and delivering of freights; shall make such just and reasonable rules and regulations as may be necessary for preventing unjust discriminations in the transportation of freight and passengers on the railroads in this State;

shall have the power to make just and reasonable joint rates for all connecting railroads doing business in this State, as to all traffic or business passing from one of said roads to another; *Provided, however,* that before applying joint rates to roads that are not under the management and control of one and the same company, the commissioners shall give thirty days' notice to said roads of the joint rate contemplated, and of its division between said roads, and give hearing to roads desiring to object to same; shall make reasonable and just rates of charge for use of railroad cars carrying any and all kinds of freight and passengers on said railroads, no matter by whom owned or carried; and shall make just and reasonable rules and regulations, to be observed by said railroad companies on said railroads, to prevent the giving or paying of any rebate or bonus, directly or indirectly, and from misleading or deceiving the public in any manner as to the real rates charged for freight and passengers; *Provided,* that nothing in this Article contained shall be taken as in any manner abridging or controlling the rates for freight charged by any railroad company in this State for carrying freight which comes from or goes beyond the boundaries of the State, and on which freight less than local rates on any railroad carrying the same are charged by such railroad; but said railroad companies shall possess the same power and right to charge such rate for carrying such freights as they possessed before October 14, 1879; said commissioners shall have full power, by rules and regulations, to designate and fix the difference in rates of freight and passenger transportation to be allowed for longer and shorter distances on the same or different railroads, and to ascertain what shall be the limits of longer and shorter distances. And said Railroad Commissioners shall have power to require the location of such depots, and the establishment of such freight and passenger buildings, as the condition of the road, the safely of freight and the public comfort and convenience may require, upon the giving of such

railroad company to be affected thereby the same notice as herein provided."

Section 2190. "The railroad commissioners are required to make for each of the railroad corporations doing business in this State as soon as practicable, a schedule of just and reasonable rates of charges for transportation of passengers and freights and cars on each of said railroads; and said schedule shall, in suits brought against any such corporation, wherein is involved the charges of any such corporation for the transportation of any passenger or freight or cars or unjust discrimination in relation thereto, be deemed and taken in all the courts of this State as sufficient evidence that the rates therein fixed are just and reasonable rates of charges for the transportation of passengers and freights and cars upon the railroads; and said commissioners shall, from time to time and as often as the circumstances may require, change and revise such schedules."

Section 2196. "If any railroad company doing business in this State, by its agents or employees, shall be guilty of a violation of the rules and regulations provided and prescribed by said commissioners, and if, after due notice of such violation given to the principal officer thereof, ample and full recompense for the wrong or injury done thereby to any person or corporation, as may be directed by said commissioners, shall not be made within thirty days from the time of such notice, such company shall incur a penalty for each offense of not less than one thousand dollars nor more than five thousand dollars, to be fixed by the presiding judge. An action for the recovery of such penalty shall be in any county in the State, where such violation has occurred or wrong has been perpetrated, and shall be in the name of the State of Georgia. The commissioners shall institute such action through the attorney-general or solicitor-general."

BRIEF OF ARGUMENT.

The decision of the Circuit Court of Appeals should be sustained and the writ of *certiorari* denied for the following amongst other reasons:

I.

It is the duty of the Railroad Commission to make just and reasonable rates for express companies on their intra-state business. Section 2189 of the Code of Georgia empowers the Commission, amongst other things, to make just and reasonable rates of freight and passenger tariffs to be observed by all railroad companies doing business in the State of Georgia, on the railroads thereof, and just and reasonable rules and regulations to be observed by all of said railroads as to their charges and such as may be necessary to prevent unjust discriminations. Section 2187 makes it unlawful for a railroad to charge higher rates than those prescribed by the Commission, and Section 2196 provides the manner of enforcing compliance with such rules and regulations and authorizes the Commission to direct the bringing of penalty suits against such railroads as violate the rules and regulations. Section 2217 places express companies under the Commission to the same extent as railroads, prescribes the same penalties, and also declares that the Commission "shall have full power to regulate the prices to be charged by any company or persons owning, controlling or operating any such line or lines for any service performed by such company or person." In the exercise of these powers the Commission prescribed the rules and rates referred to in the original bill, P. R., page 6. Copies of rules and tariffs set out in full, P. R., pages 23 to 28.

The Southern Express Company being a common carrier, it is therefore its duty to receive for carriage, and to carry

the goods of any person tendered to it for transportation, provided the party tendering them offers to pay its proper charges, which, in the State of Georgia, on all intra-state business are the charges prescribed by the Commission, 5 Enc. Law, 158, and authorities cited. The company cannot evade this duty by regulations; see same authority. When the company by a rule seeks to impose on the shipper the payment of a tax which the law imposes upon it, such a rule is unreasonable. This is true even where the rates are not prescribed by law. See case of Covington Stock Yard Co. *v.* Keith, 139 U. S. 128.

If the rules and regulations prescribed by the Commission be unjust and unreasonable the same cannot be enforced. Under the facts as presented by Petitioners' bill the rates do not appear to be unreasonably low when the order of the Commission relative to the payment of this stamp tax is complied with by the express company. The cost of handling a package for which the minimum charge is allowed is not the average cost of all packages handled by the company. The fact that average cost of all packages handled exceeds ten cents, the minimum charge, as claimed in the bill, falls short of proving that the actual cost of handling such a package is ten cents. The minimum rate fixed by the Commission is 25 cents, as shown by the rate-sheet which is made a part of the bill (P. R., pages 23, 24, 25,) hence this allegation will be fully answered by reference to such rate-sheet.

The bill alleges that the payment of the stamp tax by the company on its intra-state business will cost it $42,000. It also alleges that when the company pays the same that its net profits on a twenty-five cent package will be only three-fourths of one cent. If all of the intra-state business of the company were done for the minimum charge of twenty-five cents, then its net income from that source alone would be $31-500 per annum. It appears from the bill that the Southern Express Company does business in ten other States besides Georgia, and that the aggregate shares of the company amount

to 50,000, and that the same are of the approximata value of $2,500,000, P. R., page 4. This would give the company about one and one-fourth per cent. net income upon its entire capital from its Georgia domestic business alone, based upon the proposition that every package was transported for the minimum charge. Assuming the business in the other States to be equally as large, which is by no means improbable, the company's income from its intra-state business in the eleven States will amount to a net income of nearly 14 per cent. Add to this the income from inter-state business, and it will be apparent that the rate instead of being unreasonably low is just the reverse—unreasonably high. If the allegations of complainants upon these matters be true then it would seem that their desire to restrain the payment of this revenue stamp tax by the company does not arise from their desire to have the company charge a reasonable rate, but springs from a desire to "own the earth and the fullness thereof." The order of the Georgia Commission doesn't deprive the Southern Express Company of any of its constitutional rights.

Under the common law the public, through the proper officer, or the shippers, in their own names, would have the right to enjoin an increase of a just and reasonable rate or the establishment of an unreasonable rate by a common carrier. So far as concerns the fixation of rates the powers of the Commission certainly cover all questions that the public or shippers may properly bring before the courts, either of law or equity, affecting the matter of rates.

If the tax were levied upon the gross receipts of the company instead of upon each and every bill of lading issued by it, would anyone seriously contend that the addition of such tax to the rates prescribed by the Commission did not increase those rates? The manner of imposing the tax does not and cannot effect the principle.

The action of the Railroad Commission, which was sought to be enjoined in this case, did not amount to an order either

establishing a new rate, nor adjusting an old rate to a new condition. It did not seek to impose a new duty upon the Express Company nor to enjoin upon it the performance of any duty already imposed; on the contrary it only amounted to a monition, and informed the Express Company that for the reasons stated in the opinion upon which the monition was founded, that if it insisted upon imposing upon the shipper the burden of this tax, the Commission would regard its action as an illegal increase of an existing reasonable rate, and would institute suits in the courts with a view of having the question judicially determined. The Commission had no power to and did not undertake to impose a penalty upon the Express Company. There is in the bill no equity alleged, which was founded upon such a predicate. But the purpose of the bill was to enjoin the Commission from instituting suits; to enjoin it not from the enforcement of its own orders challenged as unreasonable, but to enjoin it from appealing to the courts.

It will no doubt be accepted as settled law that within the limit of a reasonable compensation to a carrier for a service required to be performed by it for the public, the authorities of a State government relatively to intra-state traffic may prescribe the sum which may be exacted by a carrier for the performance of such a service.

The rate prescribed in this case has not been challenged by the averments of the bill as being *per se* unreasonable. It may be safely stated not only that the Railroad Commission had the power to fix the rates for the Express Company, but that such rates as have been fixed are reasonable. It unreasonable they become such only because the War Revenue Act of Congress has imposed a special tax upon the transportation business conducted by the carrier. Does the fact that Congress has seen proper to impose upon the carrier this burden justify the carrier in demanding of the shipper a sum in addition to the rate legally prescribed by the State Commission? If so, then Congress can by imposing taxes regulate intra-state

traffic. Congress has no more power directly or indirectly to regulate intra-state traffic, than the authorities of a State have to regulate commerce between the States.

It is admitted that according to all theorists the burdens of an excise tax must fall ultimately upon the consumer, unless there is some intervening legal obstacle, which prevents the person first paying the tax from passing it along with the price of the commodity upon which the tax is levied to the person ultimately consuming it. It has been within the police power of towns, cities and States time out of mind to regulate the sale of liquor, breadstuffs, etc. When the Federal Congress or the State Legislature imposes a tax upon the manufacture of liquor, or the business of manufacturing liquor, this tax must first be paid by the distiller, he then charges it into the price of the liquor to the wholesaler and so on until it is ultimately paid by the consumer. But let us suppose that in order to prevent frauds the State in the exercise of its police power has prescribed the retail price of liquor and the size of the glass, the tax in such a case must necessarily fall short of the consumer, and while the State does not thus prescribe who shall pay the tax, it does indirectly prescribe who shall not pay it. The Act of Congress does not in terms prohibit the carrier from passing along its burden to the shoulder of the public, but the State has legally "fixed the price of the liquor and the size of the glass" and thus rendered the shifting of the burden impossible.

Prior to the passage of the Act, authorizing the making of rates if a railroad or express company sustained a loss from any cause, whether from robbery, dishonesty or negligence of its servants, or increased taxes, whether levied by the State or Federal government, there was no legal obstacle to its passing along that burden in an increased freight rate, but since its rates are made for it—since the law prescribes the rates—it must bear its own burdens.

The special tax was made the burden of the company pri-

marily. Upon the inter-state commerce it is free to pass along that burden to the public for Congress did not see proper to prohibit its doing so, but relatively to commerce within the State, the State, having competent authority to make rates, has done so and the carrier must bear its own burden. The case from Michigan recently decided by the Supreme Court does not conflict with our position in this case. It decides only that, admitting even that under the general law the burden of the stamp tax falls primarily upon the carrier, there is nothing in the Act of Congress which prohibits the carrier from passing it along to the shipper. This is true, but suppose that Congress had conferred upon the Inter-State Commerce Commission the power to fix rates upon inter-state traffic, would the carrier then as against a maximum rate established by that commission be able to pass along its burden. The power of the State with respect to intra-state rates stands upon as high a plane as that occupied by the Federal government with respect to inter-state traffic. Let us admit however that Congress may tax state commerce then, so far as may concern intra-state rates of express companies within the State of Georgia, those rates occupy to the Revenue Act practically the same position as do charges for postoffice money orders. Both charges are fixed by law. To authorize either to be increased there must be direct legislation. There is such legislation in the Act as to the postal charges, but none as to express rates. This principle is recognized in the State Freight Tax case. 15 Wall, 232–273, which is cited approvingly in the late decision in the Michigan case.

II

If the order of the Commission requiring the payment of this revenue tax by the express company be tantamount to the fixation of an unreasonably low rate by the Commission, then the express company may refuse and fail to obey the

same, and should the Commission seek to enforce its order by directing a suit to be brought in the name of the State to recover the penalty imposed by law for the failure of the company to comply with the orders of the Commission no recovery could be had, for an express company is only liable for a penalty when it violates a just and reasonable rule or regulation of the Railroad Commission. As to whether or not the order or rule in question is reasonable or unreasonable can and should be determined only upon a suit brought in the name of the State against the express company in the county where such rule or order was disobeyed. The question there involved is very fully discussed and decided in line with this contention by Judge Newman in the case of the Richmond & Danville Railroad Company *v.* Trammell, *et al.*, 53 Fed. Rep. 196. This case was considered by Judge Newman in connection with Judge Pardee, and both concurred in the decision. If the action of the Commission was final and conclusive then the Constitution of the United States might be contravened, but railroad and Express companies under that decision may defend the penalty suits by showing the orders of the Commission to be unjust and unreasonable.

The court not having jurisdiction of such penalty suits,, has not the jurisdiction of a bill to enjoin same.

A suit to recover the penalty prescribed by law for a violation of the rules and regulations of the Railroad Commisson is not a civil suit. "An action is civil when it lies to enforce a private right or redress a private wrong. It is criminal when instituted on behalf of a sovereign or commonweath in order to vindicate the law by punishment of a public offense." Repalje and Lawrence Law., Dict., page 21.

Burrell defines penalty as "a punishment imposed by statute as a consequence of the commission of a certain specific offense; a pecuniary punishment or sum of money imposed by statute to be paid as a punishment for the commissiom of a certain act." Burrell Law Dic., page 286. He defines a

penal action "to be an action upon a penal statute; an action for the recovery of the penalty given by statute."

Penalty suits are held not to be removable from State courts to Federal courts, for the reason that the same are actions of a criminal nature, and therefore not included within the Act of Congress providing for the removal of cases from State to Federal courts. 37 Fed. Rep. 497; 38 Fed. Rep. 161; 41 Fed. Rep. 228; 45 Fed. Rep. 82.

In the case of the Railroad Commission of Iowa v. Chicago Railway Company, 45 Fed. Rep. 82, it was held that a suit by the Commission to compel a railway company to obey the regulations of the Commissioners could not be removed to the Federal Courts, even though the parties were citizens of different States, such a suit being in effect an attempt by the State to execute its laws.

The State of Wisconsin in the courts of that State obtained a judgment against the Pelican Insurance Company, a corporation of the State of Louisiana, for a pecuniary penalty for a violation of the insurance laws of Wisconsin. Suit was then brought upon that judgment in the Supreme Court of the United States against the Pelican Insurance Company, and it was held, 127 U. S. 265, that as such a suit was for the purpose of collecting a pecuniary penalty, and in its nature criminal, the Supreme Court of the United States did not have jurisdiction of same.

The laws of Georgia confer jurisdiction of penalty suits alone upon the superior court in the counties where the violations of the rules and regulations of the Commission occur, and if the rule or order violated is unjust or unreasonable the company has a perfect legal defense to such penalty suits. 104 Ga. 831.

Section 720 of the Revised Statutes provides that "the right of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, ex-

cept in cases where such injunctions may be authorized by law relating to proceedings in bankruptcy."

In the case of Hapgood v. Hewitt, 119 U. S. 226, it was held that "a court of equity could not interfere to enjoin a pending or threatened suit at law, to which there is a perfect legal defense." To the same effect see 15 Wall. 373; 1 High on Injunctions, sections 89 to 93 and cases there cited.

In the case of Haynes v. Carpenter, 91 U. S. 254, it was sought to enjoin the pendency of three suits in the State courts of Louisiana. The bill was dismissed and a judgment affirming the dismissal was granted by the Supreme Court. In the opinion, Mr. Justice Bradley says: "In the first place, the great object of the suit is to enjoin and stop litigation in the State courts and to bring all the litigated cases before the Circuit Courts. This is one of the things which the Federal Courts are expressly prohibited from doing. By the Act of March 2, 1793, it was declared that a writ of injunction shall not be granted to stay proceedings in a State court. This prohibition is repeated in section 720 of the Revised Statutes, and extends to all cases, except where otherwise provided by the bankrupt law. This objection alone is sufficient ground for sustaining the demurrer of the bill." See also case of Chetwood, 165 U. S. 460.

In discussing a similar point to the one involved here in the case of Hines and Hobbs v. Rawson, 40 Ga. 356, Chief Justice Brown states the principle which is contended to be applicable to this case in the following language: "The State courts are exempt from all interference by the Federal tribunals, and the Federal courts are exempt from all interference by the State tribunals, and each is destitute of all power to restrain either the process or proceedings in the other. Circuit Courts of the United States and State courts act separately and independently of each other, and, in their respective spheres of action, the process issued by the one is as far

beyond the reach of the other as if the line of division between them 'was traced by landmarks and monuments visible to the eye.' Appellate relations exist in a class of cases between the State courts and the Supreme Court of the United States, but there are no such relations between the State courts and the Circuit Courts."

The Circuit Court of the United States not having jurisdiction of a bill seeking to enjoin suits for the recovery of penalties instituted in the State courts, for the same reason it has no jurisdiction to enjoin the institution of suits in State courts. The Circuit Courts have jurisdiction of a bill to restrain the bringing of suits where they have jurisdiction of the threatened suits, sought to be restrained, also of a bill to restrain proceedings in State courts where the suits have been removed to the Federal courts, or are removable, and also of suits based upon unconstitutional laws, but it is submitted that these penalty suits do not come within either of these categories.

III.

This is a suit against the State of Georgia, and by the eleventh amendment to the Constitution of the United States no court can entertain jurisdiction of same. Its principle object is to enjoin penalty suits against the Southern Express Company. The penalty, if recovered, is for violation of the State law. Actions to recover same are to be prosecuted in the name of the State. The amount of any recovery had under such suits is to be paid into the State Treasury and used for the benefit of the State. This it seems would beyond all question make the State a party to such suits. A State can only act through an officer or agent. By the law the officer appointed to act in bringing suits to enforce these penalties are the Railroad Commissioners, and a suit against them is equivalent to a suit against the State. This question was dis-

cussed and decided in the case of Haygood *v.* Williams, 117 U. S. 52, the court holding that "where the State is not only the real party to the controversy, but the real party against which relief is sought, the nominal parties being its agents and officers without any personal interest in the subject matter, the suit is substantially within the prohibition of the eleventh amendment."

The Texas Railroad Commission case, 154 U. S. 362, and the late case against the same Commission, decided by Judge McCormick of the U. S. Circuit Court, are not in conflict with this position, and may be harmonized with the decision of the U. S. Supreme Court, in 117 U. S. *supra*. Under the Act creating the Railroad Commission of Texas express authority is given for such suits against the Commission. See pages 391 and 392, 154 U. S. Neither does the decision of the court in the Nebraska case, 169 U. S. 466, control under the facts stated in the bill now under consideration. The Nebraska Act was unconstitutional. The Georgia law is not having been upheld by both the Georgia Supreme Court and the U. S. Supreme Court. See 70 Ga. 694, and 128 U. S. 174.

This case is practically on all fours with the case of Fitts *v.* McGhee in 172 U. S. 516. There the Court held that the suit was against the State of Alabama, and therefore could not be brought without the State's consent.

J. M. TERRELL,
Of Counsel for the Railroad Commissioners of Georgia

Atlanta, Ga.

1840

PAYMENT

OF

WAR STAMP TAX

BY

Express and Telegraph Companies.

In Re RULE REQUIRING THE SOUTHERN EXPRESS COMPANY TO SHOW CAUSE WHY SUITS SHOULD NOT BE INSTITUTED AGAINST IT FOR RECOVERY OF PENALTIES FOR DEMANDING AS A CONDITION PRECEDENT TO RECEIVING EXPRESS PACKAGES FOR SHIPMENT THAT SHIPPERS FURNISH REVENUE STAMPS REQUIRED TO BE AFFIXED TO BILLS OF LADING, ETC.,

AND

In Re COMPLAINT AGAINST THE WESTERN UNION TELEGRAPH COMPANY FOR OVERCHARGE IN DEMANDING OF THE SENDERS OF TELEGRAPHIC DISPATCHES THAT THEY ATTACH AND CANCEL THE REQUISITE REVENUE STAMPS BEFORE RECEIVING THE SAME FOR TRANSMISSION.

OPINIONS OF

COMMISSIONER ATKINSON

AND ORDERS OF

THE RAILROAD COMMISSION OF GEORGIA.

ATLANTA, GA.
THE FRANKLIN PRINTING AND PUBLISHING CO.
Geo. W. Harrison, State Printer, Manager.
1898.

OFFICE OF
THE RAILROAD COMMISSION OF GEORGIA.
ATLANTA, GA., August 2, 1898.

IN RE RULE REQUIRING THE SOUTHERN EXPRESS COMPANY TO SHOW CAUSE WHY SUITS SHOULD NOT BE INSTITUTED AGAINST IT FOR RECOVERY OF PENALTIES FOR DEMANDING AS A CONDITION PRECEDENT TO RECEIVING EXPRESS PACKAGES FOR SHIPMENT THAT SHIPPERS FURNISH REVENUE STAMPS REQUIRED TO BE AFFIXED TO BILLS OF LADING, ETC.

OPINION OF COMMISSIONER ATKINSON.

It having been brought to the attention of this Commission that since the passage by the Federal Congress of an Act entitled: "An Act to provide ways and means to meet war expenditures, and for other purposes," that the Southern Express Company, a corporation engaged as a common carrier in the transportation of goods between points within this State, demands, as a condition precedent to *forwarding* goods tendered to it for shipment, that the consignor shall deliver to it the necessary revenue stamp to be affixed to the bill of lading required to be issued by such company, and complaint being made that the effect of the refusal to transport and deliver such goods, except upon compliance with such demands, was a violation of those provisions of the law in this State limiting the rates of freight chargeable by express companies to the rates prescribed by this Commission, an order was issued, calling upon the Southern Express Company to show cause why suits

should not be instituted against it for the recovery of the penalties prescribed by law for the exaction from shippers of a sum in addition to and in excess of rates prescribed by the Commission. In response to the rule thus issued, the express company, by its counsel, appeared and answered in effect, that this Commission had no jurisdiction to inquire and determine of and concerning the several matters and things set forth in said rule. Further, it denied that it had in any manner increased its charges for *forwarding* goods, or made any demand upon any person for any sum in excess of the rate fixed by this Commission. Further, it admitted that it had declined to receive goods for shipment unless the tax laid by the revenue act in question was tendered with the goods intended to be consigned, but denied that this Commission had any authority to inquire or act concerning any refusal by it to receive goods for transportation.

While under section 2196 of the Code of this State this Commission has full power, without notice, to institute suits for the penalty named in said section, "whenever, in their opinion, the circumstances authorize it," yet, in view of the great public interest involved, and in view of the many penalties which may have been incurred under a misapprehension of the true intent of the law, and in view of the volume of litigation which would necessarily result, if in each individual case a separate suit was instituted, the Commission caused the parties interested to be summoned before it, to the end that, before taking action in regard to the subject, it might be informed as to the respective rights of the consignor and carrier, and thus be able to determine whether in its refusal to accept for shipment and to *forward* goods tendered to it for transportation, without tender likewise of the necessary revenue stamps, the carrier was indeed

acting in violation of the law, and whether, if so, the violation was of such a character as in the first instance to justify the application of the drastic remedies afforded by suits for penalties which may have been incurred.

This matter having been referred to me for examination, I herewith submit the conclusions reached, and, as well, a statement of the considerations which have induced that conclusion:

According to my conception of the issues made, two questions are presented for consideration, upon the proper solution of which will depend the correctness of the conclusion reached. The first of these is: Does the act of the Federal Congress in question impose upon the express company the duty of furnishing the requisite revenue stamps to be affixed to the bill of lading required in the case of each consignment to be issued by the carrier? Second: If so, is the refusal to accept and forward such goods, except upon the conditions that the shipper shall bear the burden of the carrier to the extent of providing such stamp in addition to the payment of the regular rate prescribed by this Commission for the transportation of such goods, a violation of the law which prohibits carriers from exacting a rate of transportation in excess of the maximum rate so prescribed?

We will proceed to consider the questions proposed in the order in which they are above stated; and first, as to the duties imposed by the statute upon the respective parties. Duties may in the abstract be classified, as imposed and assumed. The former may be properly said to embrace and require the performance of that class of acts which are enjoined upon one by a mandate of some superior power which exercises a controlling influence over the will of him who is required to perform such acts. The mandate issued by such an authority operates

upon the subject whether he be willing or unwilling; and among this class of duties is included the performance of those acts enjoined by law, and which the subject is not at liberty to omit. Assumed duties are such as result from contract relations, respecting which each individual is primarily a free agent, and which can only arise in consequence of his having of his own volition entered into an agreement by the terms of which he has become bound to the performance of a given act. Duties, whether imposed or assumed, admit of another classification equally general. They may in either case be express or implied. The former includes all of those acts which have been expressly enjoined upon the subject by the mandate of a superior power; and as well, such as by the terms of his engagement he has directly pledged himself to perform. Without reference to the sources from which such duties may arise, they are equally binding upon the subject, though the methods of enforcing their performance may widely differ. Duties may be said to be implied where the acts to which they relate are neither expressly enjoined by the superior nor expressly assumed under the contract, but which are yet of such a character as that the performance of the act enjoined or assumed necessarily involves and includes the performance of some other incidental act respecting which both the mandate of the superior and terms of the engagement are silent. In such a case the law imposes as against the person bound to perform the particular act the duty likewise to perform such incidental acts as may be necessarily involved.

These distinctions are stated in order that we may more readily arrive at the true meaning and intent of the Federal Congress as that intent is manifested by the provisions of the law in question. Referring to the act under consideration, we find no express provision imposing directly upon the carrier the duty of furnish-

ing the revenue stamps required by the statute to be affixed to its bills of lading; and yet, upon a careful consideration of its various provisions it is difficult to resist the conclusion that such was the intention of the Congress. Section 7 of the revenue act referred to provides:

"SEC. 7. That if any person or persons shall make, sign or issue, or cause to be made, signed or issued, any instrument, document or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than one hundred dollars, at the discretion of the court, and such instrument, document or paper, as aforesaid, shall not be competent evidence in any court."

Section 6 of the act describes the classes of papers and documents to which the penal provisions of section 7 are made to apply, and refers for a more complete description to what is designated as Section A, this schedule enumerating in particular the documents generally described in sections 6 and 7. Under the heads of "Express and Freight" (Schedule A), we find the following provision:

"It shall be the duty of every railroad or steamboat company, carrier, express company, or corporation, or person whose occupation it is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so inclosed or included; and there shall be duly attached, as in this act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent: *Provided*, That but one bill of lading shall be required on bundles

or packages of newspapers when inclosed in one general bundle at the time of shipment. Any failure to issue such bill of lading, manifest or other memorandum herein provided, shall subject such railroad or steamboat company, carrier, express company or corporation or person to a penalty of fifty dollars for each offense, and no such bill of lading, manifest or other memorandum shall be used as evidence unless it shall be duly stamped as aforesaid."

It will be seen from these provisions that section 7 prohibits under a named penalty the issue of any paper or document without "same being duly stamped for denoting the tax hereby (meaning by this act) imposed thereon." It will be further seen that the act imposes upon the carrier the express duty of issuing in every instance a bill of lading covering each consignment. Since, therefore, this duty is imposed and the omission to perform it rendered penal, it necessarily follows that the person expressly charged with the duty to issue the bill of lading is also impressed with the implied duty of providing the agencies and instrumentalities necessarily incidental to the performance of the duty expressly enjoined. Since he is bound to issue a bill of lading and cannot issue it without its being first stamped, the duty of stamping is necessarily incidental to and consequently included in the duty to issue. We will test this view from another point of observation: The paper upon which the bill of lading is to be written is indispensable to the execution of such an instrument. Suppose in the absence of the statute the parties had entered into a contract of affreightment under which, upon a given consideration, the carrier assumed to transport the goods of consignor to a given point, what court would for an instant consider the proposition that the consignor, in addition to the rates prescribed by the contract, should be

charged with the duty of preparing the bills of lading? The duty of preparing the bill of lading is one springing out of the contract, and devolves necessarily upon the carrier unless the consignor varies the general rule and expressly assumes that burden.

Since the law imposes upon the carrier the duty of furnishing to the shipper a bill of lading, nothing short of a complete bill of lading, evidencing a completed contract of affreightment, will suffice; for unless it comes up to that standard it is not a bill of lading in contemplation of the statute, and since the affixing of the stamp, according to the very terms of the act, is indispensable to the evidence of a contract of affreightment, it follows that this is one of the incidental acts which is to be performed by the carrier; and since the law enjoins upon it the duty to affix the stamp (there being no express requirement that it shall be furnished by the consignor), the necessary and irresistible implication is that it shall be furnished by the person bound to affix it.

In the course of argument in this case it was urged that inasmuch as the statute did not expressly designate the person who should bear the cost of furnishing the requisite stamps, its silence respecting that subject was to be accepted as evidence of indifference upon the part of the Congress as to the person upon whom this duty devolved; and, as further emphasizing this idea it was pointed out that there were two penalties imposed by the Act; one against the carrier, pecuniary in its nature; the other against the consignor, which rendered an unstamped bill of lading inadmissible as evidence. I do not find in this circumstance any evidence of a legislative intent either to excuse the carrier from the duty of affixing and furnishing the requisite stamp or of an intent to leave the matter in such a state as to enable the carrier to impose this duty upon the shipper. On the

contrary, it would seem that the infliction of the penalty upon the consignor was rather designed as an additional safeguard against loss of revenue to the Government by making it to the interest of the shipper to see to it that the carrier in the first instance furnished to him such an evidence of the contract of affreightment as would be available to him in case his rights under such contract should ever be called in question. And since this could only be accomplished by stamping the instrument as required by law, the consignor was given a direct concern in seeing to it that the carrier had performed its duty of affixing and cancelling the stamp before accepting the bill of lading. If it had been the intention of the Federal Congress to require of the carrier no more than the delivery to the consignor of the unstamped bill of lading, then the penalty for failure to stamp and cancel the same would most naturally have been directed against the person who had in accepting the bill of lading subsequently failed to stamp it. If the penal act consisted in the failure to stamp a bill of lading subsequent to its issue, there might be some reason in holding that the consignor accepting such a bill of lading would be the person whose duty it was to stamp it; but since the penal act consists in the issue of an unstamped bill of lading, it necessarily follows that the one issuing the bill of lading must stamp it in order to avoid the penalty. If it had been the purpose of the Federal Congress to impose this burden upon the shipper, the most natural course would have been to require that an article presented for shipment should itself bear a cancelled stamp. Had this been done the duty would have been upon the shipper; because until a stamp was affixed the carrier would have been under no duty to receive the goods for shipment. But since on the other hand the Congress has seen proper to require a stamp to be affixed to the bill of lading,

which must itself originate with the carrier and be issued by him, the conclusion is inevitable that it was the purpose of the law to charge the carrier with the cost.

Aside from these considerations, when we take the broader view and consider the circumstances under which and purposes for which this bill was passed; when we consider that the country was just engaging in a conflict with a great and powerful nation; that in consequence it was necessary to raise by taxation enormous sums of money to maintain the national military and naval forces and equipment and that, in order to raise this money, it was necessary to bring under the taxing power all the resources of all the people; that every industry and every person, even in the most trivial domestic and business concerns are required by the system of stamp taxation devised to contribute to this common fund; that it is so far-reaching in its effects that none could escape the exactions of the tax-gatherer, it is not conceivable that the Federal Congress should have selected great transportation companies of the country as the sole object of special legislative benefaction and, taxing all others, exempt them alone from the operation of the law. If it be ultimately held that the carrier is not liable for this tax he is excused from all contribution to the general fund; for while other corporations are taxed upon special transactions and upon gross and net receipts, these corporations are exempted from that class of taxes and throughout the whole scheme of this elaborate piece of legislation there is no provision which by any possibility can be so extended as to impose upon the carrying companies of the country any portion of the common burden. It is submitted that to attribute to the Congress such a purpose would be to deny to it credit for either patriotism or a proper sense of justice. The better conclusion is that when the Congress required carriers to issue a bill of

lading to every shipper its purpose was to require the issue of such evidence of contract of affreightment as would enable the shipper to enforce the duty of carriers; and since affixing the stamp was necessary to the completion of such a bill of lading, the duty was by necessary implication imposed upon the carrier of furnishing and cancelling it.

We come now to consider whether or not the exaction of the cost of a revenue stamp from the shipper amounts to an "extortion," within the meaning of that term as employed in section 2187 of the Code. That Section provides as follows:

"If any railroad corporation organized or doing business in this State under any act of incorporation or general law of this State now in force, or which may hereafter be enacted, or any railroad corporation organized or which may hereafter be organized under the laws of any other State, and doing business in this State, shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad car upon its track, or any of its branches thereof, or upon any railroad within this State which it has the right, license or permission to use, operate or control, the same shall be guilty of extortion, and, upon conviction thereof, shall be dealt with as hereinafter provided."

By the terms of the act creating this commission, power was conferred upon the Railroad Commission of Georgia relatively to intra-state business, in general and comprehensive terms, "to make reasonable and just rates." Section 2189 of the Code makes it the duty of and empowers the commission "to make reasonable and just rates of freight and passenger tariffs, to be observed by all railroad companies doing business in this State on the railroads thereof; shall make reasonable and just rules and regulations to be observed by all railroad companies doing business in this State as to the charges at any and all points for the necessary handling and delivery of freights; shall make such just and reasonable rules and regulations as may be necessary for preventing

unjust discriminations in the transportion of freight and passengers on the railroads in this State," and other powers and duties not necessary here to enumerate. It was required to make and publish a "schedule of just and reasonable rates of charges for the transportation of passengers and freights and cars on each of said railroads. (See Code, section 3190.) By section 2187 it was made unlawful for a railroad company to charge other than such rates; and by section 2196 appropriate penalties are provided for violations of these sections. By an act subsequently passed (which is incorporated in section 2217 of the Code of this State), express companies, to the same extent as railroads, were placed under the control of the Commission; and it was provided in the last-named act that this Commission "shall have full power to regulate the prices to be charged by any company or persons owning, controlling or operating any such line or lines for any service performed by any such company or person," and the penalties prescribed against railroads for violations of the rules and regulations of the Commission were made applicable to express companies. In the exercise of these powers the Commission has prescribed maximum rates for express service, and has fixed the "prices" to be charged by express companies for the services required to be performed by them in and about the handling of express matter. As necessarily incidental to the duty of transportation which the law of this State imposes upon all carriers, there is the duty to receive and deliver goods tendered for shipment, in accordance with the directions of the consignor. Relatively to the process of conducting their business as such, carriers may make such rules and regulations as may be necessary to their protection; but they cannot under the guise of regulation by any method, directly or indirectly, increase to the shipper beyond the rates fixed by the

Commission the "price" of any service which it undertakes to perform, or impose upon him duties and burdens which are by law imposed upon it.

Under an ordinary contract of affreightment, entered into independently of any law fixing the rates to be charged, the carrier is not authorized to add to the price of agreed compensation any expense incidentally incurred by it in the execution of the contract of affreightment. This principle is well stated in a decision of the Supreme Court of the United States, in the case of Covington Stock Yards Co. *v.* Keith. (Vol. 139 Decisions of Supreme Court, U. S., p. 135.) It there lays down the rule to be: "A carrier of live stock has no more right to make a special charge for merely receiving or merely delivering such stock in and through stock yards provided by itself, in order that it may properly receive and load, or unload and deliver such stock than a carrier of passengers may make a special charge for the use of its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars."

Such being the rule, relatively to contracts in which the price of the service is fixed by agreement between the parties, the same principle would apply with equal force where the rate is prescribed by positive law. To say that a carrier could increase the prescribed rate by the exaction of a sum in addition thereto to cover an incidental expense incurred by it in the execution of its duty to transport would be to admit that, by indirection, it could lawfully accomplish the same end which by the terms of the statute it is prohibited from doing directly.

If, therefore, an express company, under the guise of a charge for receiving goods for shipment, could exact the payment in advance of the revenue tax which devolves upon it, it could as well demand for the same reason any other sum. If they may exact one cent for receiving goods, they may as well exact one hundred cents, and thus directly increase the cost of the service required by law to be performed by it far beyond that prescribed by the rates fixed by this Commission. The service required by law to be performed by the carrier, as we have seen, includes the receipt, transmission and delivery of goods offered for shipment. By the express terms of the statute this Commission is authorized to fix in advance the "price" of that service. It cannot demand from the shipper any sum for that service beyond the rate prescribed; and an effort to subdivide the service so as to enable it to make a charge beyond the prescribed rate is necessarily merely colorable, and is such a scheme or device to evade the law as ought not to be accepted as an excuse for its refusal to conform to the regulations of this Commission fixing rates. While it is true that under its right to make reasonable rules and regulations, compliance with which may be required as a condition precedent to the reception of goods for shipment, it has no right by these means to impose upon the shipper the burdens which otherwise under the law would rest upon it.

I am thus led to the conclusion that in refusing to accept for shipment goods tendered to it without the prepayment by the shipper of the revenue tax required by it to be affixed to its bill of lading, it violates the provisions of the Act hereinbefore referred to, and incurs the penalties which are therein prescribed.

Respectfully submitted,

SPENCER R. ATKINSON,
Commissioner.

OFFICE OF
THE RAILROAD COMMISSION OF GEORGIA.
ATLANTA, GA., August 2, 1898.

IN RE COMPLAINT AGAINST THE SOUTHERN EXPRESS COMPANY FOR OVERCHARGE IN DEMANDING THAT SHIPPERS FURNISH REVENUE STAMPS TO AFFIX TO BILLS OF LADING OR RECEIPTS.

On motion of Commissioner Crenshaw it is ordered: That the report and opinion this day filed by Commissioner Atkinson, to whom the above entitled matter was referred, be, and the same is, hereby adopted as the opinion and judgment of this Commission:

And it is further ordered: That unless within five days from this date this Commission is advised by the Southern Express Company that it has discontinued the practice of exacting from shippers the duty of furnishing the requisite revenue stamps to be attached to bills of lading or receipts as a condition precedent to receiving and forwarding goods tendered for shipment, that this Commission will take such legal steps as may be necessary to enforce compliance with its rules and regulations.

By order of the Board:

J. D. MASSEY, Secretary.

L. N. TRAMMELL, Chairman.